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No. 09-923

Supreme Court, U.S.
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In The
Supreme Court of the United States

MAHER ARAR,

Petitioner,

v.

JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF *AMICUS CURIAE* OF MANFRED NOWAK AND THEO VAN BOVEN, CURRENT AND FORMER U.N. SPECIAL RAPPORTEURS ON TORTURE AND OTHER CRUEL, INHUMAN AND DEGRADING TREATMENT IN SUPPORT OF THE ISSUANCE OF A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

Manfred Nowak is the U.N. Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment, a position he has held since 2004. He is Professor of International Human Rights Protection at the University of Vienna and Director of the Ludwig Boltzmann Institute of Human Rights. He has served as Chair of the European Masters Degree in Human Rights and Democratisation, a program initiated by the European Commission and jointly organized by 41 European universities, and has been since 1995 a Member of the International Commission of Jurists. Professor Nowak has served in a variety of capacities related to human rights, including as a Member of the EU Network of Independent Experts on Fundamental Rights (2002-2006), a U.N. Expert on Disappearances (1993-2006), a Consultant to the U.N. High Commissioner on Human Rights on poverty reduction (2001-2006), and a Judge at the Human Rights Chamber for Bosnia-Herzogovina (1996-2003). Professor Nowak has authored more than 400 publications in the fields of constitutional, administrative and international law, with a focus on human rights.

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the intention to file this *amicus* brief, all counsel have consented to the filing of this brief; and the consent letters have been filed with the Clerk of the Court with this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amici curiae* or their counsel, made a monetary contribution to the preparation or submission of this brief.

Theo van Boven served as the U.N. Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment from 2001 to 2004. He is Professor of Law at the University of Maastricht, Netherlands. Professor van Boven is an Honorary Commissioner of the International Commission of Jurists and a Member of the Advisory Council of International Service for Human Rights (Geneva). Professor van Boven has served in a variety of capacities related to human rights, including as the Director of the U.N. Division of Human Rights (1977-1982), a Member of the U.N. Committee on the Elimination of Racial Discrimination (1992-1999), the Registrar of the International Criminal Tribunal for the Former Yugoslavia (1994), Special Rapporteur of the U.N. Sub-Commission on the Rights to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms (1990-1993), and a Member of the Group of Independent Experts of the International Labour Organization to Monitor Sanctions and Other Measures against Apartheid (1990-1993). Professor van Boven has published many books and articles on the law of torture and on international human rights law generally.

As current and former U.N. Special Rapporteurs on Torture and Other Cruel, Inhuman and Degrading Treatment, Professors Nowak and van Boven have a particular interest in promoting observance of the absolute and non-derogable prohibitions against torture and against the transfer of any person to a country where there are substantial grounds for believing

that the person would be in danger of being subjected to torture. *Amici* file this brief in support of Maher Arar's petition for *certiorari*.

SUMMARY OF ARGUMENT

This case involves allegations that officials of the United States government removed the petitioner, Maher Arar, from the United States via Jordan to Syria, for the purpose of having him interrogated under torture. If his allegations are true, Mr. Arar's treatment violated two of the most fundamental norms of human rights and humanitarian law: the absolute prohibition against torture, and the equally absolute prohibition against refoulement, or transfer, of a person to face torture. Impunity for acts of torture or refoulement to face torture can never be countenanced. Because of the nature and gravity of Mr. Arar's allegations, it is essential that he have the opportunity to have his case determined on the merits, in the interest of accountability and (if the allegations are found to be true) appropriate redress.

Amici therefore submit this brief in support of Mr. Arar's petition for *certiorari*, to urge this Court to review the lower court decision denying petitioner the opportunity to have his claims heard on the merits. *Amici* will present and support two fundamental premises. First, international law absolutely and without exception prohibits both torture and refoulement to face torture. Second, the United States has unequivocally undertaken to be bound by the

international prohibition against torture and refoulement to face torture through its ratification of relevant international treaties, its own domestic laws, and its official pronouncements to the international community.

ARGUMENT

I. INTERNATIONAL LAW UNEQUIVOCALLY PROHIBITS TORTURE AND REFOULEMENT TO FACE TORTURE

A. Torture is absolutely prohibited

(1) International Human Rights Law

The prohibition against torture is absolute. Torture is prohibited by a host of binding international treaties as well as by customary international law. It is prohibited both in times of peace and under circumstances of armed conflict. This prohibition admits of no exceptions. No extraordinary circumstances of any kind can justify the use of torture.

International human rights instruments absolutely prohibit torture. The Universal Declaration of Human Rights, adopted in 1948 by the United Nations General Assembly, proclaims in Article 5 that "[n]o one shall be subjected to torture."[2] This

[2] Universal Declaration of Human Rights, G.A. Res. 217A, art. 5, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

aspirational mandate was transformed into a binding legal obligation through the International Covenant on Civil and Political Rights (ICCPR),[3] an international treaty which went into effect in 1976, and to which 165 nations have now committed themselves as States Parties.[4] Pursuant to ICCPR Article 2, every State Party is obliged "to respect and to ensure to all individuals within its territory and subject to its jurisdiction" each of the rights recognized in the ICCPR.[5] Among those rights is the Article 7 guarantee that "[n]o one shall be subjected to torture."[6] The absolute nature of this command is underscored by ICCPR Article 4, which addresses the human rights obligations of States Parties in the extreme circumstance of a "public emergency which threatens the life of the nation."[7] Although Article 4 allows States Parties in such a circumstance to take some "measures derogating from their [ICCPR] obligations," the Article 7 prohibition of torture is singled out as one of several

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[3] International Covenant on Civil and Political Rights art 4 2, *opened for signature* Dec 19, 1966, S Exec Doc C, D, E, F, 95-2 (1978), 999 U N T.S. 171 [hereinafter ICCPR]

[4] United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, International Covenant on Civil and Political Rights, http://treaties.un org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Mar 1, 2010)

[5] ICCPR, *supra* note 3, art 2.

[6] *Id.* art. 7

[7] *Id.* art 4

treaty obligations from which no derogation is ever allowed.[8]

Regional human rights treaties echo this prohibition on torture. The mandate that "[n]o one shall be subjected to torture" is reiterated in both the [European] Convention for the Protection of Human Rights and Fundamental Freedoms[9] and the American Convention on Human Rights,[10] and a comparable prohibition of torture appears in the African Charter on Human and Peoples' Rights.[11]

The international community's determination to put an effective end to torture is further reflected in the 1984 adoption of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[12] That treaty – to which 147

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[8] *Id* art. 4.2

[9] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms art 3, *entered into force* Sept 3, 1953, 213 U.N.T.S. 222

[10] Organization of American States, American Convention on Human Rights art 5 2, Nov 22, 1969, O.A.S.T.S No 36, 1144 U.N.T.S 123.

[11] Organization of African Unity, African [Banjul] Charter on Human and Peoples' Rights art 5, June 27, 1981, O.A.U Doc CAB/LEG/67/3 rev. 5, 1520 U.N.T.S 217.

[12] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec 10, 1984, S. Treaty Doc No. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter CAT].

nations are now States Parties[13] – sets forth a series of specific state obligations designed to prevent torture and, failing that, to hold every perpetrator accountable and to provide every victim of torture with an effective means of redress. It requires each State Party to "take effective legislative, administrative, judicial or other measures to prevent acts of torture."[14] It reiterates that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[15] It reminds that "[a]n order from a superior officer or a public authority may not be invoked as a justification of torture."[16] In a provision that will be discussed further, *infra* at 13 it declares that "[n]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[17] States Parties must "ensure" that all persons involved in any way in the "custody, interrogation or treatment of any individual subjected

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[13] United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=IV-9&chapter=4&lang=en#12 (last visited Mar. 2, 2010).

[14] CAT, *supra* note 12, art. 2.1.

[15] *Id.* art. 2.2.

[16] *Id.* art. 2.3.

[17] *Id.* art. 3.1.

to any form of arrest, detention or imprisonment" receive "education and information regarding the prohibition against torture," and the rules and instructions regarding their duties must include the prohibition against torture.[18] These requirements expressly extend to law enforcement personnel – both civil and military – as well as public officials and medical personnel.[19] Each State Party must "keep under systematic review" its "rules, instructions, methods and practices" with respect to interrogation, custody and treatment of persons under arrest, detention or imprisonment, "with a view to preventing any cases of torture."[20] To remove an incentive for torture, each State Party must "ensure" that no statement obtained under torture is used as evidence in any proceeding.[21]

To address those situations where torture occurs despite this panoply of preventive requirements, CAT requires measures to hold perpetrators accountable and to provide victims with appropriate redress. Each State Party must "ensure" that all acts of torture, attempts to commit torture, and acts constituting "complicity or participation in torture" are criminal offenses under its domestic criminal law.[22] Penalties

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[18] *Id* art 10

[19] *Id.*

[20] CAT, *supra* note 12, art 11.

[21] *Id.* art. 15. The sole exception is that a statement obtained under torture may be used in proceedings against the accused torturer, as evidence that the statement was made *Id.*

[22] *Id* art. 4.1

upon conviction of these torture offenses must be commensurate with the "grave nature" of these offenses.[23] Whenever a State Party becomes aware that a person accused of a torture offense is present in its territory, it must take steps to assure that the person is either extradited for prosecution elsewhere or referred for prosecution in its own courts.[24] If need be, a State Party must adjust its jurisdictional provisions so that such a person can be prosecuted in its domestic courts, even when the alleged torture offense occurred elsewhere, and when neither the accused nor the victim are nationals of that state.[25] These provisions are designed to guarantee that there be no impunity for torture offenses. They are matched by provisions guaranteeing a torture victim the opportunity for redress: "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible."[26]

(2) International Humanitarian Law

International humanitarian law, applicable in situations of armed conflict, is equally firm in absolutely proscribing any act of torture. Torture is

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[23] *Id* art. 4.2.

[24] *Id* art. 7 1 *See also* arts 6-9

[25] CAT, *supra* note 12, art. 5

[26] *Id.* art. 14 1.

prohibited by each of the four Geneva Conventions of 1949, which protect, respectively, wounded and sick combatants on land (GC I), wounded and sick combatants at sea (GC II), prisoners of war (GC III), and civilians in wartime, including those living in occupied territories (GC IV).[27] The torture of protected persons is designated by each of the four Geneva Conventions as a "grave breach"[28] and hence is considered a war crime. Each State Party is required to enact any legislation "necessary to provide effective penal sanctions" for persons committing, or ordering to be committed, the grave breach of torture,[29] and is further required to search for persons accused of having ordered or committed torture, and either

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[27] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 12, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 12, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GCII]; Geneva Convention Relative to the Treatment of Prisoners of War art. 17, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 32, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

[28] *See* GC I, *supra* note 27, art. 50; GC II, *supra* note 27, art. 51; GC III, *supra* note 27, art. 130; GC IV, *supra* note 27, art. 147.

[29] *See* GC I, *supra* note 27, art. 49; GC II, *supra* note 27, art. 50; GC III, *supra* note 27, art. 129; GC IV, *supra* note 27, art. 146.

prosecute them in its own courts or turn them over to another state for prosecution.[30]

While the provisions of the Geneva Conventions discussed above are applicable to armed conflict of an international character, Common Article 3 – the text of which appears, identically, as Article 3 of each of these four Geneva Conventions – proscribes torture when committed in the context of armed conflict not of an international character: "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely. . . . To this end, the following acts" – which include "torture" – "are and shall remain prohibited at any time and in any place whatsoever. . . ."[31] Torture in violation of Common Article 3 is considered a war crime.[32]

(3) Customary International Law

Customary international law as well as treaty law absolutely prohibits torture under any circumstance.

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[30] *See* GC I, *supra* note 27, art. 49; GC II, *supra* note 27, art. 50; GC III, *supra* note 27, art. 129; GC IV, *supra* note 27, art. 146.

[31] GC I, *supra* note 27, art. 3; GC II, *supra* note 27, art. 3; GC III, *supra* note 27, art. 3; GC IV, *supra* note 27, art. 3.

[32] *See* Rome Statute of the International Criminal Court art. 8(c)(i), *opened for signature* July 17, 1998, 2187 U.N.T.S. 90. *See also* War Crimes Act of 1996, 18 U.S.C. § 2441 c(3) and d(1)(A) (2006).

Indeed, the prohibition against torture is recognized as a *jus cogens*, or "peremptory," norm of customary international law – *i.e.*, a norm "of superior status"[33] which is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."[34] As the Committee against Torture[35] has written, "Since the adoption of the Convention against Torture, the absolute and non-derogable character of this prohibition has become accepted as a matter of customary international law. The provisions of [CAT] article 2 reinforce this peremptory *jus cogens* norm against torture. . . ."[36] Other authorities are in agreement.[37]

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[33] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 331 cmt. e (1987) (noting peremptory norms enjoy "superior status" under international law).

[34] Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (defining "peremptory norm").

[35] The Committee against Torture (CAT) is a body of 10 independent experts that monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by its State parties. Office of the United Nations High Commissioner for Human Rights, Committee against Torture: Monitoring the prevention of torture and other cruel, inhuman or degrading treatment or punishment, http://www2.ohchr.org/english/bodies/cat/ (last visited Mar. 2, 2010).

[36] Comm. against Torture (CAT), *General Comment No. 2: Implementation of article 2 by States parties*, ¶ 1, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) [hereinafter CAT *General Comment No. 2*].

[37] *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(d) and cmt. n (1987); *Prosecutor v.*

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Torture is thus proscribed absolutely and without exception as a matter of not only conventional but also customary international law.

B. Refoulement to face torture is absolutely prohibited

Just as torture itself is prohibited absolutely and without exception, so too is refoulement to face torture. The obligation of non-refoulement is clearly and unequivocally articulated in Article 3 of the Convention against Torture: "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[38]

But while this obligation is a critical component of CAT, it did not originate with CAT. Rather, "[t]he principle of non-refoulement . . . is an absolute obligation deriving from the absolute and non-derogable nature of the prohibition of torture."[39] International

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Kunarac & Others, Case No IT-96-23-T & IT-96-23/1-T, Judgement, ¶ 466 (Feb 22, 2001) ("Torture is prohibited under both conventional and customary international law and it is prohibited both in times of peace and during an armed conflict The prohibition can be said to constitute a norm of *jus cogens* "); *Filartiga v Peña-Irala*, 630 F.2d 876, 882 (2d Cir. 1980) (explaining that the prohibition of torture "has become a part of customary international law")

[38] CAT, *supra* note 12, art 3

[39] Manfred Nowak, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Civil*

(Continued on following page)

law has long recognized that the officer or official who orders torture is as culpable as the soldier or police officer who commits the act of torture.[40] "[T]hose exercising superior authority – including public officials – cannot avoid accountability or escape criminal responsibility for torture . . . committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures."[41] So too, the official who sends a person to another state to face torture shares culpability with whoever in the receiving state orders or commits the torture.

Accordingly, international human rights treaties predating CAT are properly construed to prohibit not only torture itself, but also refoulement to face torture. The U.N. Human Rights Committee (UN HRC), established under the ICCPR and charged with monitoring and encouraging compliance with that treaty, has explained that a state's ICCPR obligation to "respect and ensure" ICCPR rights entails an obligation

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and Political Rights, Including the Questions of Torture and Detention, ¶ 31(a), *delivered to the Commission on Human Rights at the 62nd Session*, U.N. Doc. E/CN 4/2006/6 (Dec. 23, 2005)

[40] *See* GC I, *supra* note 27, art 49, GC II, *supra* note 27, art. 50; GC III, *supra* note 27, art 129, GC IV, *supra* note 27, art. 146

[41] CAT *General Comment No 2*, *supra* note 36, ¶ 26.

not to send a person to another state where that person would face a real risk of torture:

> [T]he [ICCPR] article 2 obligation that States Parties respect and ensure the [ICCPR] rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 [right to life] and 7 [prohibition of torture] of the [ICCPR], either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.[42]

Thus, the UN HRC has concluded that "States parties must not expose individuals to the danger of torture . . . upon return to another country by way of their extradition, expulsion or refoulement."[43]

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[42] Human Rights Comm (CCPR), *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 12, U N Doc CCPR/C/21/Rev.1/Add 13 (May 26, 2004).

[43] Human Rights Comm (CCPR), *General Comment No 20 Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment*, ¶ 9 (Mar. 10, 1992), *in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc HRI/GEN/1/Rev.6 at 151 (2003).

Similarly, the European Court of Human Rights has construed article 3 of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms as encompassing an obligation of non-refoulement. In *Soering v. United Kingdom*,[44] the European Court of Human Rights held that article 3's "absolute prohibition of torture"[45] proscribed as well the extradition of a fugitive to another State "where there were substantial grounds for believing that he would be in danger of being subjected to torture."[46] Violation of the obligation of non-refoulement would thus lead to "liability incurred by the extraditing [State Party] by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment."[47] The European Court reaffirmed this ruling in the context of an attempted deportation for reasons of national security in *Chahal v. United Kingdom*:[48]

> The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading

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[44] *Soering v United Kingdom*, 11 Eur. Ct H R (ser A) (1989)

[45] *Id.* ¶ 88.

[46] *Id.* ¶ 88. *See also* ¶ 91

[47] *Id.* ¶ 91.

[48] *Chahal v United Kingdom*, 23 Eur Ct H R 413 (1996)

> treatment or punishment, irrespective of the victim's conduct. . . . Article 3 (art. 3) makes no provision for exceptions and no derogation from it is permissible . . . even in the event of a public emergency threatening the life of the nation. . . .
>
> The prohibition provided by Article 3 (art. 3) against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. . . . In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.[49]

Accordingly, the non-refoulement principle is an absolute obligation under the European Convention's prohibition of torture.

The non-refoulement principle is also an absolute principle of customary international law. As the Committee against Torture has emphasized, "non-refoulement must be recognized as a peremptory

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[49] *Id.* ¶¶ 79-80

norm under international law, and not merely as a principle enshrined in article 3 of the Convention."[50]

II. THE UNITED STATES HAS UNDERTAKEN TO BE BOUND BY THE INTERNATIONAL PROHIBITION OF TORTURE AND REFOULEMENT TO FACE TORTURE

The United States has undertaken as a matter of both international and domestic law to be bound by the absolute prohibition of torture as well as the absolute principle of non-refoulement. It has done so by ratifying relevant treaties, by enacting domestic law relating to torture and non-refoulement, and by making unequivocal pronouncements on the international stage.

The United States is a State Party to a host of treaties that categorically and without exception ban torture. As early as 1948, the United States joined with other nations of the world in adopting the Universal Declaration of Human Rights,[51] including its article 5 mandate that "[n]o one shall be subjected to torture." In 1955, the United States ratified the four Geneva Conventions,[52] each of which prohibits torture and requires that it be prosecuted as a war

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[50] Comm. against Torture (CAT), *Summary Record of the 624th Meeting on Wednesday, November 17, 2004*, ¶ 52, U.N. Doc. CAT/C/SR.624 (Nov. 24, 2004).

[51] *See* H.R. Con. Res. 185, 105th Cong. (1998) (enacted).

[52] *See supra* note 27.

crime.[53] In 1992, the United States became a State Party to the ICCPR,[54] which requires States Parties "to respect and to ensure" the rights recognized in the ICCPR, including the absolute and non-derogable prohibition of torture.[55] And in 1994, the United States became a State Party to the Convention against Torture, undertaking to comply with the panoply of obligations which that treaty imposes on States Parties so as to prevent, punish and provide redress for torture.[56]

The United States has likewise consented to be bound by the principle of non-refoulement. As noted above, that principle must be understood to be an

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[53] *See* GC I, *supra* note 27, arts. 12, 49-50; GC II, *supra* note 27, arts 12, 50-51; GC III, *supra* note 27, arts 17, 129-30; GC IV, *supra* note 27, arts. 32, 146-47.

[54] *See* United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, International Covenant on Civil and Political Rights, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Mar. 1, 2010)

[55] ICCPR, *supra* note 3, art 2 *See also* art 4.

[56] *See* United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=IV-9&chapter=4&lang=en#12 (last visited Mar. 2, 2010) While the U.S. ratified CAT subject to two reservations – one regarding the definition of cruel, inhuman or degrading treatment or punishment and another exercising the CAT art. 30(2) option to decline agreement with the arbitration provision of CAT art. 30(1) – neither of these reservations negates the treaty obligation to prevent, punish and provide redress for torture. *Id.*

inherent component of the prohibition of torture; hence, the United States' ratification of treaties banning torture implies a treaty obligation to abide by the principle of non-refoulement. But lest there be any doubt, the United States has unequivocally bound itself to comply with the non-refoulement principle through its ratification of the Convention against Torture,[57] article 3 of which commands that "[n]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[58]

The domestic law of the United States reflects these treaty obligations in a number of respects. Presidential Executive Order 13,491 on "Ensuring Lawful Interrogations" orders:

> [I]ndividuals detained in any armed conflict . . . shall in all circumstances be treated humanely and shall not be subjected to . . . torture . . . whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States.[59]

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[57] *See id.*

[58] CAT, *supra* note 12, art. 3

[59] Exec Order No 13,491, § 3(a) (Jan 22, 2009), 74 Fed Reg 4,893 (Jan 27, 2009) [hereinafter Exec. Order No. 13,491]

The War Crimes Act of 1996 criminalizes grave breaches of the Geneva Conventions and serious violations of Common Article 3, including torture.[60] A federal anti-torture statute permits the United States to prosecute acts of torture outside the United States, as well as attempts and conspiracies to commit such torture, whenever the alleged offender either is a U.S. national or is present in the United States.[61] The Torture Victim Protection Act provides a civil remedy for victims of torture.[62]

Specifically with respect to the obligation of non-refoulement, the Foreign Affairs Reform and Restructuring Act (FARRA) declares:

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[60] War Crimes Act of 1996, 18 U S C. § 2441 (2006).

[61] *See* 18 U S.C §§ 2340-2340A (2006) The United States has represented internationally that torture offenses committed *within* the United States can be prosecuted under pre-existing domestic law *See* Comm against Torture (CAT), *Consideration of Reports Submitted By States Parties under Article 19 of the Convention, Second periodic reports of States parties due in 1999, Addendum, United States of America*, ¶ 16, U.N Doc. CAT/C/48/Add.3 (June 29, 2005) [hereinafter *Second periodic report of the U.S to CAT*] ("[A]ny act of torture falling within the Torture Convention definition would in fact be criminally prosecutable in every jurisdiction within the United States Such acts may be prosecuted, for example, as assault, battery or mayhem in cases of physical injury; as homicide, murder or manslaughter, when a killing results; as kidnapping, false imprisonment or abduction where an unlawful detention is concerned; as rape, sodomy, or molestation; or as part of an attempt, or a conspiracy, an act of racketeering, or a criminal violation of an individual's civil rights.")

[62] Torture Victim Protection Act, 28 U S C § 1350 note (2006).

> It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.[63]

To effectuate this policy, FARRA required the promulgation of regulations consistent with the United States' obligations under the CAT non-refoulement provision.[64] In a similar vein, Presidential Executive Order 13,491 ordered a review of U.S. practices with respect to the transfer of individuals to other states "to ensure that such practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture . . .."[65]

The United States has repeatedly reaffirmed to the international community its commitment to be bound by the prohibitions on torture and refoulement to face torture. On September 23, 2009, President Barack Obama appeared before the United Nations General Assembly and reaffirmed the United States' commitment to the prohibition of torture: "On my first day in office, I prohibited – without exception or

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[63] Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G., Title XXII, § 2242(a), 112 Stat. 2681-822, codified as 8 U.S.C. § 1231 note (2006).

[64] *See id.* § 2242(b).

[65] Exec. Order No. 13,491, *supra* note 59, § 5(e)(ii).

equivocation – the use of torture by the United States of America. . . . Every nation must know: America will live its values, and we will lead by example."[66] Earlier, in 2006, the United States reiterated to the Committee against Torture its opposition to torture and its commitment to the non-refoulement principle:

> [T]he United States is unequivocally opposed to the use and practice of torture. No circumstance whatsoever, including war, the threat of war, internal political instability, public emergency, or an order from a superior officer or public authority, may be invoked as a justification for or defense to committing torture. This is a longstanding commitment of the United States, repeatedly reaffirmed at the highest levels of the U.S. government.[67]

In a 2004 submission to the Inter-American Commission on Human Rights, the United States represented:

> [The President] has made clear that the United States stands against and will not tolerate torture and that the United States remains committed to complying with its obligations under the Convention Against

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[66] Barack Obama, President of the U S , Responsibility for Our Common Future, Address to the United Nations General Assembly (Sept 23, 2009) (transcript available at http://www.un org/ga/64/generaldebate/pdf/US_en pdf) (last visited Mar 2, 2010).

[67] *Second periodic report of the U S. to CAT*, *supra* note 61, ¶ 6.

> Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Consistent with that treaty, the United States does not expel, return or extradite individuals to countries where the United States believes it is likely that they will be tortured.[68]

In both its Initial Report to the Committee against Torture, and again in its Second Periodic Report to that Committee, the United States affirmed that it "recognize[d] its obligation not to 'expel, return ('refouler') or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture'."[69]

CONCLUSION

Under both conventional and customary international law, the prohibition of torture is absolute and non-derogable. So, too, is the obligation to respect the principle of non-refoulement. The United States has undertaken to be bound by these international

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[68] U.S. Department of State, 60 U.S. submission to IACHR regarding detention and treatment of detainees (Dec. 16, 2004), www.state.gov/s/l/2004/78299.htm

[69] Comm. against Torture (CAT), *Consideration of Reports Submitted By States Parties under Article 19 of the Convention, Initial reports of States parties due in 1995, Addendum, United States of America*, ¶ 156, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000); *Second periodic report of the U.S. to CAT*, *supra* note 61, ¶ 30

obligations through its ratification of relevant treaties, its own domestic law, and its repeated pronouncements to the international community.

The petitioner in this case has alleged that, notwithstanding these obligations, officials of the United States government removed him from the United States via Jordan to Syria for the purpose of having him interrogated under torture. If true, these allegations would represent a most grievous violation of the United States' obligations to foreswear complicity in torture and refoulement to face torture. Because of the gravity of these allegations and the critical importance of the obligations alleged to have been violated, *amici* respectfully urge this Court to grant *certiorari* to review the decision below denying petitioner the opportunity to have his claims heard on the merits.

Respectfully submitted,

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